IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1086

VIRGIL JOHN ETCHIESON,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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VIRGIL JOHN ETCHIESON, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, rendered in the above entitled cause on November 1, 1978. Said judgment became final on November 29, 1978 upon the overruling of Petitioner's Second Motion for Rehearing.

CITATIONS TO OPINIONS BELOW

The first opinion of the Court of Criminal Appeals of Texas in the above entitled cause is reported in 549 S.W. 2d 409. The aforementioned opinion was a per curiam affirmance of the instant cause on the basis that Appellant's Brief was untimely filed in the trial court, in violation of Article 40.09, Section 9, V.A.C.C.P. (a copy of the Decision is attached hereto in Appendix I, Exhibit A). On May 9, 1977, the Appellant filed a Motion for Nunc Pro Tunc Order with the trial court to establish that Appellant's Brief had in fact been timely filed. On May 9, 1977, after a hearing in the trial court, the trial judge entered a Nunc Pro Tunc Order establishing that Appellant's Brief had in fact been timely filed. Subsequently, on May 10, 1977, Petitioner mailed his Motion for Leave to File Motion for Rehearing and his Motion for Rehearing to the Texas Court of Criminal Appeals in Cause Number 53,167, which was granted. On November 1, 1978, the Court of Criminal Appeals of the State of Texas delivered its opinion in Cause Number 53,167, ____ S.W. 2d ____ (unreported, a copy of the Decision is attached hereto in Appendix I, Exhibit A). Petitioner's Second Motion for Leave to File Motion for Rehearing En Banc and Motion for Rehearing were denied by the Court of Criminal Appeals of the State of Texas on November 29, 1978, at which time the Court of Criminal Appeals granted Petitioner's Motion to Stay Mandate Pending Petition for Writ of Certiorari which was filed on November 27, 1978.

JURISDICTION

The Jurisdiction of this Honorable Court to review the judgment and decision of the Court of Criminal Appeals of the State of Texas is invoked under Title 28, U.S.C.A., Section 1254(1).

The opinion of the Court of Criminal Appeals of Texas in this cause is in conflict with the Constitution of the United States and is in conflict with the Supreme Court of the United States and is in conflict with the holdings of other United States Courts of Appeals on substantial federal constitutional questions.

The First Judgment of the Court of Criminal Appeals of the State of Texas was delivered and entered on May 3, 1977. The Petitioner's Motion for Rehearing was granted and the Second Judgment and Opinion was delivered and entered on November 1, 1978. The Petitioner's Second Motion for Rehearing was overruled without written opinion and the Judgment in this cause became final on November 29, 1978, upon the entry of the Judgment by the Court of Criminal Appeals of Texas whereupon Petitioner exhausted his State remedies.

The judicial authority vesting final jurisdiction in State criminal proceedings in the State of Texas is reflected by the following constitutional and statutory provisions.

Vernon's Annotated Texas Constitution, Article 5, Section 1 and Section 5, provide as follows:

> Article 5, Section 1
>
> Section 1. The judicial power of this State shall be vested in one Supreme Court, in the Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.
>
> Article 5, Section 5
>
> Section 5. The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

The Legislature of the State of Texas, acting pursuant to the aforesaid state constitutional mandate provided for appeals in criminal cases by the enactment of the Code of Criminal Procedure of Texas, Article 4.03, to-wit:

> The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This

> Article shall not be so construed as to embrace any case which has been appealed from any inferior Court or the county court, the county criminal court or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

The Court of Criminal Appeals of Texas is the highest Appellate Court in Texas in criminal cases. *Pointer* v. *Texas*, 380 U.S. 400, 402 (1965).

QUESTIONS PRESENTED

First Question

Where a substantial preliminary showing of falsity has been made regarding the affiant's allegations regarding probable cause contained in the affidavit which supports the issuance of a search warrant, does the failure to reveal the identity of the informant who would have knowledge of the veracity of the statements made by affiant, upon request by Petitioner at the hearing on probable cause, violate the requirements of *Roviaro* v. *United States*, 353 U.S. 53 (1957); *McCray* v. *Illinois*, 386 U.S. 300 (1967) and *Franks* v. *Delaware*, ____ U.S. ____, 57 L.Ed. 2d 667 (1978)?

Second Question

Where the information provided by the informant to the affiant comprises the bulk of the allegations con-

tained in the affidavit for the search warrant, which said information was crucial to the validity of the basis for the determination of probable cause, does the failure to reveal the identity of the informant, herein, upon request by the Petitioner at the hearing on probable cause, to test the knowledge and credibility of the informant, violate the requirements of *Roviaro* v. *United States, supra,* and *McCray* v. *Illinois, supra*?

Third Question

Where the State introduces evidence of the informant's substantial participation and actual presence at the occurrence of the commission of criminal acts which serve as the basis of a continuing criminal enterprise for which Petitioner has been charged, does the failure to reveal the identity of the informant where his testimony was essential to the presentation of the Petitioner's defense, violate the requirements of *Roviaro* v. *United States, supra,* and *McCray* v. *Illinois, supra*?

Fourth Question

Where the Petitioner has demonstrated that the informant is the sole witness available to corroborate the Petitioner's claim of entrapment and essential to the entire presentation of his defense at trial, does the denial of disclosure by the trial court based on public policy grounds comport with the constitutional requirements of confrontation, cross-examination and compulsory process assured to Petitioner by the Fifth,

Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved herein are the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article One, Sections 9 and 10 of the Constitution of the State of Texas. The Statutory provisions involved herein are Rules 4, 5 and 41 of the Federal Rules of Criminal Procedure and Articles 1.06, 18.01, 18.03 and 38.23, Vernon's Annotated Code of Criminal Procedure of Texas (1977). Because of their length, the text of all of the foregoing provisions are set forth in Appendix I, Exhibit B.

STATEMENT OF THE NATURE OF THE CASE

Procedural History of the Case

The Petitioner, Virgil John Etchieson, was charged with the offense of aggravated promotion of prostitution pursuant to Section 43.04, V.A.P.C. (1977). The Indictment was returned by a Grand Jury of Dallas County, Texas, and the case was set for trial in the 195th Judicial District Criminal Court of Dallas County, Texas. Prior to trial, the Petitioner filed numerous motions and memoranda which included in part the following: Motion for Discovery and Inspection, Mo-

tion to Quash Indictment, Motion to Suppress Evidence, Supplemental Motion to Suppress Evidence, Motion to Require Disclosure of Informer's Identity, Motion for Disclosure of Evidence Obtained By or as a Result of Electronic Surveillance, Motion to Require the Endorsement of Names of Witnesses Upon Whose Testimony the Indictment was Found, Memorandum of Law In Support of Defendant's Motion for Disclosure of Identity of Informer, Motion for Inspection of Grand Jury Testimony, Supplemental Memorandum of Law in Support of Defendant's Motion for Disclosure of Identity of Informer, Supplemental Motion to Suppress and Memorandum in Support Thereof, Supplemental Motion for Disclosure of the Name and Address of the Informer, Supplemental Motion to Suppress and Memorandum in Support Thereof, and numerous other motions which are not relevant to the issues raised by Petitioner herein. A plenary hearing on said Motions was held by the trial court and the Motions were denied. Subsequently, Petitioner was tried for said offense. Notably, during the course of the trial proceedings, the Petitioner's counsel reurged both his Motion to Suppress and Motion for Disclosure of Informant's Identity numerous times. The trial court denied said motions each time they were reurged by the Petitioner's counsel. The Petitioner was convicted of the offense of aggravated promotion of prostitution and the jury assessed Petitioner's punishment at ten (10) years confinement and a Five Thousand ($5,-000.00) Dollar fine. Petitioner appealed the conviction to the Court of Criminal Appeals of the State of Texas

in Cause Number 53,167. The Court of Criminal Appeals in a per curiam opinion affirmed the conviction on May 3, 1977. On May 10, 1977, the Petitioner mailed his Motion for Leave to File Motion for Rehearing and his Motion for Rehearing to the Court of Criminal Appeals of the State of Texas. Pursuant thereto, the Court of Criminal Appeals of the State of Texas granted the Petitioner's Motion for Leave to File Motion for Rehearing, and on November 1, 1978, the Court delivered its opinion in the instant case and affirmed the conviction. On November 10, 1978, the Petitioner's Second Motion for Leave to File Motion for Rehearing En Banc and Motion for Rehearing were filed in the Court of Criminal Appeals of the State of Texas. On November 29, 1978, the Court of Criminal Appeals of the State of Texas denied Petitioner's Second Motion for Rehearing En Banc upon which time said judgment became final.

Facts Material to the Questions Presented

The Record reflects that at the Petitioner's trial the State presented evidence of numerous events which lead to Petitioner's arrest and alleged exposure of a prostitution type operation which was alleged to be operated and controlled by the Petitioner herein. Officers of the Vice Enforcement Section of the Dallas Police Department were assisted in their investigation by the cooperation of a prostitute named Francis Weatherspoon and a police informant known by an

alias, Jimmy Hopgood. On December 8, 1974, one Sergeant Fowler, with the assistance of Francis Weatherspoon, placed a call to Petitioner's co-defendant, Pamela Wood, to arrange a date for prostitution. Subsequent to the phone conversation of December 8, 1974, a date was arranged for the police informant, Jimmy Hopgood, to meet at the Ramada Inn Convention Center in Dallas. Again, on December 9, 1974, the informant, Officer Duncan and Sergeant Fowler met at Francis Weatherspoon's house to place another phone call to Petitioner's co-defendant, Pamela Wood. On December 10, 1974, according to the evidence presented at trial, the informer, Hopgood, met with one Debra Walker, known as Sandy, at the Convention Center in Dallas, Texas. Notably, Officer Duncan testified at the hearings on the Motion to Suppress and Motion for Disclosure of the Informant's Identity, that the date with the informant at the Ramada Inn was on December 17, 1974, which was a direct contradiction to the evidence presented at trial. While several officers were present in the lobby of the Convention Center maintaining surveillance, it was only the informant who was actually present in the hotel room and who was alleged to have been accommodated by a date of prostitution with Debra Walker. Subsequent to Hopgood's date of prostitution with Debra Walker, Sergeant Fowler placed another phone call to Petitioner's co-defendant, Pamela Wood, known as Cyn, to arrange seven (7) dates of prostitution for an alleged Mastercharge Seminar which was to be held in Dallas, Texas on December 18, 1974. The co-

defendant, Wood, agreed that seven (7) girls would be furnished and that the girls would provide a lesbian type show and then each of the men present would have sexual intercourse with one of the prostitutes. In the afternoon hours of December 18, 1974, one Sergeant Duncan, who was assigned to the same Vice Unit as Sergeant Billy Fowler, met Sergeant Billy Fowler and was accompanied by the Police informant, Jimmy Hopgood. The three (3) men met at a public telephone and Sergeant Fowler placed a telephone call to Petitioner's co-defendant, Pamela Wood, to inform her of the details regarding the aforementioned prostitution party which had been scheduled for that evening at the Registry Hotel in Dallas, Texas. At 9:00 p.m. on December 18, 1974, police officers with the assistance of several civilians arrived at the Registry Hotel in Dallas, Texas and staked out three (3) rooms, one of which was Room 454, wherein the prostitution party was to occur. The seven (7) prostitutes arrived at the Registry Hotel on the aforementioned evening and, as a result of agreements between the police officers and cooperating civilians and the prostitutes, to accept One Thousand Four Hundred ($1,400.00) Dollars for intercourse. The police officers in an adjoining room converged and arrested the prostitutes. The crucial issue as to whether or not the informant was present on this evening will be discussed in more detail hereinbelow.

Following the December 18, 1974 arrest, Officer Duncan swore out an affidavit for search warrant

requesting a warrant to search the Petitioner's residence located at Route 3, Box 435, Louisville, Denton County, Texas. The contents of the warrant are as follows:

> I, the affiant, received information from a confidential informant on numerous occasions, most recently on December 16, 1974, that Virgil John Etchieson is operating a prostitution enterprise from the above mentioned location. The informant stated that he visited the location on December 16, 1974 and observed Virgil John Etchieson discussing the price for a date of prostitution with an unknown date. The informant also stated that books containing names and telephone numbers of male persons are referred to when male persons called Virgil John Etchieson requesting dates of prostitution. Virgil John Etchieson is a known pimp in character and has been convicted for procuring and prostitutional offenses in the past. I, the affiant have received information from this informant in the past on at least five different occasions and on each occasion the information proved to be reliable, true and correct. On December 17, 1974, the affiant observed the informant call 231-9061, a phone number registered to Virgil John Etchieson at the above mentioned address and request the date of prostitution. A female answered the call and described herself

as 'a redheaded girl called Cyn', and she agreed to send the informant a woman to fill a straight date of prostitution for the sum of fifty dollars. The informant stated that the prostitution for the sum of fifty dollars. The informant stated that the prostitute did in fact meet him and fill the date of prostitution with him for the sum of fifty dollars. On December 18, 1974, the informant and an undercover officer of the Dallas Police Department called 231-9061 and requested seven (7) females for prostitution purposes be sent to their hotel. The female known as 'Cyn' again answered the call and stated that she would send seven (7) prostitutes to their location to perform straight dates, french dates, and show dates of prostitution for the sum of Two Hundred ($200.00) Dollars for each prostitute. The prostitutes did in fact come to the designated location and did agree to the above described dates of prostitution, were paid by the undercover officer and then arrested for a violation of Section 43.02 (prostitution) of the Texas Penal Code. The phone number called on each occasion is registered to Virgil John Etchieson, the known pimp. The information on who the telephone is registered to was obtained after Dallas Police Department Officers obtained a court order to get information. The informant's information has always been reliable, true and correct.

On April 4, 1975, pre-trial hearings were conducted before the Honorable R. T. Scales, Judge of the 195th Judicial District Court of Dallas County, Texas. The attorney of record presented numerous motions of which the two most pertinent were a Motion to Suppress Evidence and a Motion to Disclose the Identity of the Informant. As reflected in Petitioner's Appellate Brief, which was submitted to the Texas Court of Criminal Appeals, the Petitioner's attorney of record, purposely presented his Motion to Suppress, taking the search warrant, the affidavit and execution prior to presenting his Motion to Disclose the Name of the Informant. This was a deliberate tactic — done with the assurance that the officers would supply whatever evidence was needed to support the Motion to Disclose the Name of the Informant. What the officers failed to realize was that their testimony, true or not, would place them in a posture where they would have to testify differently to combat the next Motion to Disclose the Informant's Identity; which clearly the officers did. Officer Duncan testified at the hearing on the Motion to Suppress that Sergeant Fowler was the undercover officer who was referred to but not named in the affidavit. On cross-examination, Officer Duncan was asked: "Which of the allegations in this affidavit are based upon Sergeant Fowler's information that he had given you?". The following change then took place:

> A. Yes, I can. Towards the bottom of the affidavit where it states on December 18 — about midway through the affidavit — 'on

December 18, 1974, the informant and the undercover officer of the Dallas Police Department —,' — that's with reference to Sergeant Fowler.

Q. All right. So then the sentence following that, describing the activities on December 18, are connected with Sergeant Fowler?

A. That's correct.

Q. All right. Are any of the other allegations contained there on the face of the affidavit pertaining to information related to you by Sergeant Fowler?

A. No, they're not.

Thus, at no time during this hearing did Officer Duncan suggest that the statements in the affidavit which concerns Sergeant Fowler were untrue or distorted in any way. In fact, in testifying about the affidavit and the search warrant, Officer Duncan indicated that he remembered all of the information in both "quite clearly". In doing so, he thereby implied that he had nothing to say which would constitute a qualification or repudiation of the statements in the affidavit. The following exchange took place while Duncan was in the process of verifying the authenticity of the photo copies of the affidavit and search warrant:

Q. Now, State's Exhibit 1 and 2 are xeroxed copies, is that correct?

A. Yes, they are.

Q. Are they, as far as you know and to the best of your knowledge, true and exact xerox copies of the originals?

A. Yes they are.

Q. How do you know that?

A. My signature is affixed to the affidavit and I recall the information quite clearly on both copies.

On April 18, 1975, the trial court held a second hearing on Petitioner's Motion to Suppress. The primary purpose of this hearing was to determine whether the search warrant was sufficiently specific in its description of the address and location of the premises to be searched. Duncan testified, and again the record reflects no retreat from the language in the affidavit. The next hearing was held on July 8, 1975. At the beginning of the hearing, the trial judge indicated that he had granted all of Petitioner's motions with the exception of the Motion to Quash and not ruled on the Motion to Reveal the Identity of the Informant. It was at this hearing that Officer Duncan, as well as the undercover agent, Fowler, first testified that the statements in the affidavit were in essence incorrect. The following colloquy took place during the cross-examination of Officer Duncan by Petitioner's attorney of record:

Q. Now, coming down to December 18, 1974, if you will track down with me, you stated there that the informer and an undercover officer of the Dallas Police Department called 231-9061 and requested seven females for prostitution to be sent to their hotel. Did the informant tell you that?

A. No, sir.

Q. And what you are saying is that this is not true?

A. No, sir, that's not what I'm saying.

Q. Well, did the informer together with the undercover officer make this call?

A. As I testified earlier, the undercover officer made the call.

Q. Then I am asking you again, was it correct when you stated under oath that the informant together with the undercover officer made the call?

A. Well, what I was referring to was the informant was at the location along with the undercover officer when the call was made.

Q. Now who else was there?

A. Myself. . . .

Q. (by Mr. Colvin) I am directing your attention to the last line of that paragraph. Were you mistaken when you said that the females were to be sent to 'their hotel'?

A. (by the witness) Well, as I stated earlier, what I was referring to when I said 'their location', was referring to 'their' being the undercover officers that were to be at the hotel in question.

Q. But you didn't say that in your affidavit, did you?

A. Well, yes, sir. That's what I thought I was saying. Yes.

Q. Well, lets track up above this. The first part of that sentence you mentioned two peo-

ple, the informant and the undercover officer and then you refer in the last part of the sentence to 'their hotel'. That could only refer to two people as we read your affidavit. Am I correct?

A. No, sir.

Q. Where in the affidavit, then, do you see anything about undercover officers in their hotel room?

A. Well, there isn't. That's not in the affidavit.

Q. You state up above — if you will, track up a little bit with me, Mr. Duncan 'Virgil John Etchieson as a known pimp in character and has been convicted for procuring.' Lets stop at that point. Now, you state that yourself, I believe. Is that true — that he has been convicted of procuring? . . .

A. Yes.

Q. 'And has been convicted for procuring.' Now, I'll stop at that point. Is that true? You knew it of your own knowledge he had been convicted of procuring?

A. He has been convicted of county vagrancy, which in my mind includes pimping and prostitution violations.

Q. You are not precisely familiar with the offense of procuring?

A. No, no.

Q. Well, that could be an error?

A. Pardon me?

Q. I say, that could be an error if it were a county offense of procuring?

A. Well, I don't know if I follow your question.

Q. Well, I am asking you: could that be an error that he was when you say he was convicted of procuring?

A. Well, it's possible that he has not been convicted of procuring per se, yes.

Q. All right. Now, when you say 'prostitutional offenses in the past', finishing out that line, you are talking about city vagrancy?

A. Yes, city and county vagrancy. Yes.

Q. County vagrancy?

A. Yes.

Notably, Officer Duncan had testified on his direct examination that while the affidavit indicated that the informant was present with himself and Officer Fowler on December 18, 1974 when the phone call was placed from the phone booth to give the co-defendant of Petitioner the details regarding the planned December 18 prostitution party, the informant knew nothing about the attempts to set up a party with the prostitutes or anything else regarding the event to occur.

Moreover, at the trial additional false testimony was elicited from both Officer Duncan and Sergeant Fowler to further indicate that at the guilt or innocence phase the identity of the informant was necessary to be disclosed to the Petitioner to assist in the preparation of

his defense. At the aforementioned pre-trial hearings, Officer Duncan testified to the following:

> Q. Did you meet this man (the informant) on December 17, 1974?
>
> A. Yes, I did.
>
> Q. And he himself made a date of prostitution with just one girl, is that correct?
>
> A. That's correct.
>
> Q. Was Billy Fowler present at that time?
>
> A. No he was not.
>
> Q. Did Billy Fowler know anything about it?
>
> A. No, he did not.

However, at trial Sergeant Fowler testified that the correct date on which the informant had made a date of prostitution was not in fact December 17, but December 10. Moreover, the transcript indicates that on December 9, 1974, Officer Duncan, Sergeant Fowler and the informant were at Francis Weatherspoon's residence at the time when the actual date for prostitution was arranged between the informant Jimmy Hopgood and a prostitute. In fact, Sergeant Fowler testified that both he and officer Duncan conducted the surveillance at the hotel lobby on December 10 and when Jimmy Hopgood had been accommodated by the prostitute, both of the officers went to Jimmy Hopgood's room at the aforementioned hotel. At that time, Sergeant Fowler made a telephone call from the informant's room at the Ramada Convention Center to the

co-defendant of Petitioner at which time he proposed the December 18 Mastercharge Seminar party.

At numerous times during the aforementioned pre-trial hearings, Petitioner's attorney of record attempted to determine whether or not the informant was present on December 18, 1974, at the Registry Hotel wherein the alleged Mastercharge party was to occur. Officer Duncan testified at the pre-trial hearing:

> Q. You were present that night at the Registry Hotel, is that correct?
>
> A. That's correct. Yes.
>
> Q. You participated in the arrest of seven girls that appeared there?
>
> A. Yes, I did.
>
> Q. Will you tell the judge whether or not this person (the informant) that was with you there that afternoon was at the Registry Hotel that night as far as you know?
>
> A. No, he was not.
>
> Q. You did not see him, is that correct?
>
> A. No, I did not.

At trial however, Sergeant Fowler testified to the following:

> A. (by the witness) Excuse me. I told her that we had reservations at the Registry Hotel; to send the girls to Room 454 and to have them there at 9:00 p.m. — 9:00.

Q. Did Cyn agree to do that or not agree to do that or what?

A. She assured me that she had seven good looking girls who would be there at 9:00.

Q. Sergeant Fowler, after this, did you, in fact, go to Room 454 there at the Hotel?

A. Yes, I did.

Q. And were you by yourself or were other people with you?

A. There were several other people with me.

Q. Was Jimmy Hopgood there?

A. Yes, he was.

Q. Was that so — what was the reason for having Jimmy Hopgood there?

A. Because Debra K. Walker, the alias name of Cindy, [sic] had seen Jimmy Hopgood at the Ramada Convention Center. We assumed or thought that she might possibly be one that came to the party and so he would have to be there.

Q. OK. Other than you and Jimmy Hopgood going as Sam Williams were any other people there in Room 454 with you?

A. Yes there were.

Q. Were these police officers?

A. Three of them, yes, sir . . . .

Q. Were other officers there in your room 454 who were not actually in that room?

A. Yes, sir there were . . .

Q. And would you tell us whether or not you had arranged to give a cue of any sort to

the other officers as to when they should come into the room?

A. Yes, I did.

Thus, at both the pre-trial hearings and at the guilt or innocence phase of Petitioner's trial, Petitioner did in fact make a prima facia showing of material falsity as to those statements contained in the affidavit which supported the search warrant and those statements regarding the informant's presence at the December 18 prostitution party. The trial court at every phase of the proceeding denied the Petitioner the right to inquire as to the identity of the informant to test both the truth of the affidavit which supported the search warrant and to inquire into the reliability or credibility of the alleged informant. The trial court further denied the Petitioner the right to inquire of any other matters which would enable the trial court to determine the reliability or credibility of Officer Duncan and Sergeant Fowler — facts which the informant who was present at the continuing commission of the alleged offense, for which the informant would be able to provide testimony. Further, the State presented to the jury facts regarding the informant's participation in the continuing offense, however, at no time was the Petitioner to inquire of the informant the precise nature of his activities. In fact, as the Record demonstrates neither Officer Duncan nor Sergeant Fowler were present in the room with the informant and the prostitutes on December 10, 1974 when the informant met with the prostitutes. However, such cir-

cumstantial evidence was presented against the Petitioner at the guilt or innocence phase of his trial. Finally, the State, in its closing arguments numerous times referred to the informant and his participation in setting up the numerous criminal occurrences which supported the guilt of the Petitioner for a prostitution enterprise.

Federal Questions Raised in the Trial Court and the Court of Criminal Appeals of Texas

A. In The Trial Court

Prior to the trial on the merits below, Petitioner filed his Motion for Discovery and Inspection, Motion to Suppress Evidence, and Motion for Disclosure of Identity of Informant. The Motion to require disclosure of informant's identity alleged a violation of Petitioner's constitutional rights pursuant to the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States in that:

1. The informant was present and a participant in the commission of the alleged offense and thus, his identity should be disclosed to aid the Petitioner in the preparation of his defense;

2. The informant was a material witness on the issues of Petitioner's guilt or innocence in the existence of entrapment as a matter of law and/or fact;

3. The informant's identity was required to enable Petitioner to present proof that the officer's did not rely upon credible information supplied by a reliable informant;

4. Disclosure was required at the pre-trial hearing to determine the reliability and credibility of the affiant who testified as to the contents of the affidavit which supported the search warrant.

The trial court denied the Petitioner's Motion for Disclosure of the Informer's Identity and to Suppress Evidence over Petitioner's objections and exceptions.

In the course of the trial, Petitioner's attorney of record urged the court to consider all of the said Federal Constitutional questions and the Petitioner succeeded in supplying the trial court with prima facia evidence of falsity contained in the affidavit which supported the search warrant as well as proof of participation per se on the part of the informant. At no time did the State make any attempt to refute the aforementioned facts which establish the falsity of the testimony presented by the State.

B. In the Court of Criminal Appeals of Texas

The Petitioner submitted a comprehensive brief on appeal to the Court of Criminal Appeals of the State of Texas setting forth all of the contentions he is now presenting before this Honorable Court. The Court of

Criminal Appeals considered the questions presented herein as indicated by its opinion delivered on November 1, 1978 as follows:

> In the instant case the informant was not present at the time appellant was arrested nor was the informant a participant in the offense.

With reference to the Petitioner's attack upon the veracity of the allegations contained in the affidavit on the controlling issue of probable cause and the reliability and credibility of the affiant:

> Appellant asserts that the search warrant was invalid because it was based on intentional misrepresentations by the affiant, Officer Duncan. The alleged misrepresentation centers on Duncan's testimony at the hearings on the motions to suppress and to disclose the identity of the informant. . . . While there appears to be some minor discrepencies between Duncan's testimony and the facts set forth in the affidavit, the record before us supplies no basis for a determination that the search warrant was based upon intentional misrepresentations by the affiant.

In answering the Petitioner's contentions that the informant could be a material witness as to whether or not Officer Duncan relied on credible information in making his affidavit, the Court stated:

> In his brief, appellant quotes from *Roviaro* v. *United States*, 353 U.S. 53, . . . wherein it was written: 'we believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individuals right to prepare his defense whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors'.

However, the Court also wrote:

> '. . . the purpose of the privilege (informant's privileges) is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.'
>
> The identity of the informant need not be disclosed unless (1) the informant participated in the offense; (2) was present at the time of the offense or arrest; (3) was otherwise shown to be a material witness to the transaction or as to whether appellant knowingly committed

> the act charged. *Carmouche* v. *State*, 542 S.W. 2d 701 and cases cited therein. . . .

Petitioner contends, however, that the informant could be a material witness as to whether Duncan relied on credible information in making his affidavit. He argues that the statement in the affidavit wherein Duncan talks about the telephone call made by Fowler to the Petitioner's co-defendant to arrange the prostitution party on December 18, 1974 in the presence of the informant is sufficient to show the informant's participation in the criminal occurrence. Petitioner relies upon *James* v. *State*, 493 S.W. 2d 201. In *James, supra*, informant brought the defendant and the undercover agent together and was present when the sale of marijuana was consummated. The informant in the instant case was neither present at the time the prostitutes were arrested nor did he initiate or participate in establishing initial contact or making arrangements with Petitioner for the prostitutes to be present at the hotel on December 18, 1974. The *James* case is not applicable. See also, *Carmouche, supra*.

Petitioner timely filed his Second Motion for Leave to File Motion for Rehearing En Banc and for Motion for Rehearing following the affirmance by the Appellate Court below and in Second Motion for Rehearing reurged to the Court all the matters urged in his original brief and his First Motion for Rehearing which are now presented to this Honorable Court. The Second Motion for Rehearing was overruled by a majority of the Court.

The Honorable Judge Roberts wrote a dissenting opinion wherein Judge Roberts stated in regard to Petitioner's objection regarding the nondisclosure of the informant's identity that:

> The present case goes beyond *Franks* (*Franks* v. *Delaware*, 98 S.Ct. 2646). Here, as in *Franks*, appellant made a substantial preliminary showing that the affiant, acting with reckless disregard for the truth, included false statements in the affidavit. Moreover, a reading of the affidavit makes it evident that the allegedly false statement was necessary to the finding of probable cause. Compare the affidavit in *Franks*, reproduced as Appendix A of that opinion. The opinion in *Franks* makes it clear that allegations of deliberate or reckless falsehood in an affidavit must be specific and must be accompanied by an offer of proof. 'Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.' id., 98 S.Ct., at 2685. The problem in the case before us is that, because the informant's identity was not disclosed, appellant was not able to offer proof of what the informant's testimony would have been. In a case such as this — where there is a timely preliminary showing that the affidavit contains a recklessly false statement which is necessary to the finding of probable cause — I would hope that

> the trial judge must not only hold a *Franks* hearing, he must also require the state to reveal the name of the informant in those cases where (1) the informant played a material part in the determination of probable cause, and (2) the defense expresses a desire to present his testimony at the preliminary hearing. . . . I would hope, under these facts, that the trial judges failure to require disclosure of the informant's identity constitutes reversible error.

Judge Roberts also considered Petitioner's objection regarding the nondisclosure of informant's identity at trial:

> Appellant's complaint about the nondisclosure of the informant's identity is directed not only to the issue of probable cause. Although appellant initially contends that he needed to know the informant's name in order to show that Duncan's affidavit was not based on probable cause, he also urges that knowledge of identity was also crucial to the issue of entrapment, which is directly related to the issue of appellant's innocence or guilt. Appellant raised his contention in a timely manner in the trial court as part of his motion to require the state to disclose the identity of the informant.
>
> I would hold that Roger Duncan's sworn statements contained in his search warrant af-

> fidavit (set out in majority opinion) were sufficient to show that the unidentified informant 'helped set up the criminal occurrence and played a prominent part in it.' *James, supra,* at 202. It is not significant that appellant did not raise an entrapment at trial. See *James, supra* at 203, 206 (dissenting opinion).

It was pursuant to said dissenting opinion of Judge Roberts that Petitioner filed a Second Motion for Rehearing which was overruled without written opinion on November 29, 1978.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

Where a substantial preliminary showing of falsity has been made regarding the affiant's allegations regarding probable cause contained in the affidavit which supports the issuance of a search warrant, does the failure to reveal the identity of the informant who would have knowledge of the veracity of the statements made by affiant, upon request by Petitioner at the hearing on probable cause, violate the requirements of *Roviaro* v. *United States,* 353 U.S. 53 (1957); *McCray* v. *Illinois,* 386 U.S. 300 (1967) and *Franks* v. *Delaware,* ____ U.S. ____, 57 L.Ed. 2d 667 (1978)?

Certiorari should be granted herein due to the fact that this Court in the case *Franks* v. *Delaware,* ____ U.S.

____, 57 L.Ed. 2d 667 (1978), did not decide the question raised by Petitioner, to-wit:

> And because we are faced today with only the question of integrity of the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made. (at 681).

While the Supreme Court of the United States has not had occasion to consider this question, the Third Circuit has reviewed the issue and held in a manner which is in conflict with the Texas Court of Criminal Appeals decision in the instant case. The Third Circuit in the case *United States, ex rel Petillo* v. *State of New Jersey*, 562 F.2d 903 (1977) held that the district court correctly decided this Fourth Amendment issue however, vacated the district court's judgment granting the Petition of a state prisoner for Habeas Corpus on other grounds. The Court therein states:

> The district court was correct in maintaining that due process would have required disclosure of the informant's identity once the trial judge had entertained doubts as to the troopers veracity. at 907.

The Circuit, however, vacated the district court's judgment on the grounds that the issue was not properly raised in a federal habeas corpus proceedings. An examination of the district court's voluminous opinion in *United States ex rel Petillo* v. *State of New Jersey*, 400 F.Supp. 1152 (D.C., N.J., 1975) more fully explains the grounds for the Circuit in concluding that the district court had correctly decided the Fourth Amendment issue. First, the district court examined the state trial court's finding that the testimony and affidavit were accurate with regard to the testimony of the police officer at the probable cause hearing. The district court held that:

> The state court found that the testimony and the affidavit were accurate with regard to the calls by the policemen. That finding is not fairly supported by the record, within the meaning of *Townsend* v. *Saine*, 372 U.S. 293 . . . (1963), since it must necessarily have been predicated on the state judges erroneous characterization of the Wosky testimony. (at 1165).

Second, the Court concluded that:

> When a defendant introduces substantial evidence from an authoritative and independent source which directly contradicts some of the material allegations of the affidavit, the trier must face and resolve the dispute. Rarely, if ever can the subject of a search con-

> trovert every averment in an affidavit. No matter how fictitious or numerous in the statement, all that the defendant may be able to show is that some of them were deliberate falsehoods. He may then appropriately seek to attack the credibility of the remainder of the affidavit on the basis of those falsehoods he has been able to demonstrate . . . . *Moreover, it is also clear that due process requires that the informant be produced, in order for any fair determination to be made on the question of whether the lieutenant lied in his affidavit.*
>
> On this record the informant had to be produced in order for the court to determine Gauthier's credibility fairly, and until the issue of Gauthier's credibility was faced and resolved, no part of the affidavit could fairly be relied upon. To the extent that disclosure of the informant's identity was denied under these circumstances the hearing did not meet the standards of due process clause. (at 1166)

The Court points out in footnote 8 of the district court's opinion that:

> *McCray* (*McCray* v. *Illinois*, 386 U.S. 300 (1967)) is thus distinguishable from the case at bar. To hold that the due process clause does not require the state judge to assume that perjury is being committed in every hearing is certainly not to say that the clause tolerates a rule

> which, under the circumstances of this case, prohibits an adversary hearing or inquiry at all. Once a prima facia showing of material misrepresentation has been made, as here, the credibility of the officers is indeed essential to a fair determination of the cause. *Roviaro, supra,* 353 U.S. at 61.

The Petitioner herein submits that the Texas Court of Criminal Appeals has held in direct conflict with the findings of the Third Circuit that where the record does not support the findings of the trial court judge in his determination as to the veracity of the affiant's statements contained in the affidavit for search warrant and where the Petitioner has made a preliminary showing of falsity contained in said affidavit, that there is a denial of due process of law where the informant's identity has not been disclosed for a determination in an adversary proceeding as to the credibility of the affiant.

Finally, this Court's own statement in *Franks, supra,* makes it clear that this difficult issue while not before the Court in the *Franks* case, is clearly one which is raised in the instant case and should be determined by this Honorable Court.

II.

Where the information provided by the informant to the affiant comprises the bulk of the allegations con-

tained in the affidavit for the search warrant, which said information was crucial to the validity of the basis for the determination of probable cause, does the failure to reveal the identity of the informant, herein, upon request by the Petitioner at the hearing on probable cause, to test the knowledge and credibility of the informant, violate the requirements of *Roviaro* v. *United States, supra* and *McCray* v. *Illinois, supra?*

Certiorari should be granted herein due to the fact that a conflict exists between the Second, Third, Fourth, Fifth, Eighth and Ninth Circuits in the interpretation of the holdings of *Roviaro* v. *United States, supra,* and *McCray* v. *Illinois,* 386 U.S. 300 (1967) as to whether a reviewing court must require the disclosure of the identity of an informant where the information provided by the informant to the affiant is crucial to the validity of the basis for the determination of probable cause and the defendant requests disclosure to test the reliability and accuracy of said informant.

The Second Circuit has held that where the reliability of the informer's information is essential to establish probable cause, the Government must give the information to a defendant. In later opinions, however, the Second Circuit qualified their original holding by stating that the disclosure of an informant's identity is required only when the existence of probable cause depends *entirely on the reliability of the informant.* The Second Circuit held that nondisclosure was permissible where independent police investigation and corrobora-

tion contributed to probable cause since even though the independent evidence is not adequate of itself to establish probable cause, it constitutes a sufficient voucher against fabrication, although not a complete one. *United States* v. *Edmonds*, 535 F.2d 714 (2nd Cir., 1976). See also, *United States* v. *Rosario*, 327 F.2d 561 (1964); *United States* v. *Santiago*, 327 F.2d 573 (1964); *United States* v. *Cappabianca*, 398 F.2d 356 (1968) cert. den. November 12, 1968, 89 S.Ct. 294, 320.

The Third Circuit, regarding the issue of disclosure of the informant's identity has held that disclosure will be compelled if useful evidence can be admitted to vindicate the accused's innocence, lessen the risk of false testimony or if disclosure is essential to the proper disposition of the case. The Third Circuit, unlike the Second Circuit does not require that the information which supports probable cause be supplied only by the informant without any independent police investigation. *Wilson* v. *United States*, 59 F.2d 390 (CA 3, 1932). See also, Point I, *infra*.

The Fourth Circuit has also had occasion to consider the issue of disclosure of the informant's identity at the hearing on probable cause to determine the reliability and credibility of the informant. The issue was raised where the defendant requested disclosure in support of its effort to invalidate a search warrant. In the case of *United States* v. *Whiting*, 311 F.2d 191 (1962), the District Court held:

> In the present case, however, we have no such situation for, as the attorney for the defendants admitted, the names of the informers were wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case. (at 196).

It is clear from the articulation by the Fourth Circuit in the *Whiting* case that the interpretation of "in the presentation of their case" is contrary to the meanings which have been imparted by the Supreme Court of the United States in *Roviaro* v. *United States, supra,* and *McCray* v. *Illinois, supra,* in that it is interpreted to exclude any request made at the hearings on probable cause. This is a restrictive interpretation created by the Fourth Circuit which is contrary to the true meaning of the *Roviaro* and *McCray* cases.

The Supreme Court has stated in the case *Roviaro* v. *United States, supra:*

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible

> defenses, the possible significance of the informer's testimony and other relevant factors. (at 60-62).

The Supreme Court continues in *McCray* v. *Illinois, supra:*

> What Roviaro thus makes clear is that this court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. (at 70)

It is clear from the statements articulated in *Roviaro, supra* and *McCray, supra,* that there is no fixed rule as to when the informant's identity should be disclosed at the stage of determining probable cause. Thus, the statements made by the Fourth Circuit in *Whiting, supra,* do not clearly comport with the intent of the Supreme Court in the aforementioned opinions and it is unclear that the terminology "preparation for their case" excludes the disclosure of the informant's identity at the probable cause stage in an appropriate case. The Fourth Circuit in a more recent case *McLawhorn* v. *State of North Carolina,* 484 F.2d 1 (1973) in a footnote to its opinion declared:

> We have previously recognized the privilege to withhold the identity of an informant. United States v. Fisher, 440 F.2d 654 (1971); United States v. Pitt, 382 F.2d 332 (1967); United States v. Whiting, 311 F.2d 191 (1962). In each of these cases the informant was a mere tipster who supplied information sufficient to show probable cause for the issuance of a search warrant. (at 4, f.n. 10)

While it seems clear from *Roviaro, supra,* that information from a mere tipster does not mandate the disclosure of identity, the Fourth Circuit's opinion raises the issue of when an informant becomes a participant for purposes of disclosure at a probable cause determination. The Court in *McLawhorn, supra,* did not undertake to define the difference between a participant and a tipster for purposes of disclosure at the probable cause hearing, however, the Court did suggest that an in-camera hearing be utilized by the Courts to make that determination. 484 F.2d 1, at 5, f.n. 13. Clearly, the *McLawhorn* opinion in citing *Whiting, supra,* fails to dissipate the ambiguity regarding the Fourth Circuit's position as to whether an informant's identity should be disclosed at the stage of the probable cause determination.

The Fifth Circuit in the case of *United States* v. *Mendoza,* 433 F.2d 891 (1970) unequivocally stated that the rule is well established that the government need not disclose the identity of an informant when the sole pur-

pose to be served is to attack probable cause supporting the search warrant. The Court therein concluded that although the informant gave information to narcotic agents that led to the defendant's arrest, there was no evidence showing that the informant in anyway participated in the offense charged. However, the defendant in that case requested disclosure for purposes of testing the credibility and reliability of the informant and to demonstrate to the Court his belief that the informer was a man who had repeatedly threatened him and who could have planted the contraband in the house wherein the defendant was arrested. The thrust of the *Mendoza supra,* opinion indicates that unlike the Fourth Circuit, the Fifth Circuit does not require any preliminary adversary determination of the informant's participation in the first instance or any in-camera determination regarding the credibility and reliability of the informant which is a separate and distinct issue.

A more recent case from the Fifth Circuit, *United States* v. *Freund,* 525 F.2d 873 (1976), cert. den. 426 U.S. 923, suggested in dicta in the opinion that an in-camera hearing would be an appropriate procedural vehicle for accomplishing the accommodation of the conflicting interest of the defendant in obtaining disclosure of the State in protecting its agents anonymity. While the Court in *Freund, supra,* recognizes that *McCray, supra,* does not operate as a bar to ordering disclosure in all probable cause cases and that in a proper case, the trial court may wish to examine the informant to assess his

credibility or accuracy, the court fails to set forth any specific guidelines regarding when an in-camera hearing may be required to assess the credibility or accuracy of the informant. In fact, the Court states:

> Certainly there will be cases in which an in-camera hearing is either unnecessary or insufficient to protect the defendant's rights. In the case at bar, however, the procedure is appropriate and required. (at 878).

Thus, in review of the Fifth Circuit opinions several points remain unclear, to-wit: (1) for purposes of a probable cause hearing, the issue as to the informant's credibility or accuracy is interchangeably mixed with the issue of his participation and yet there is no statement regarding what is "participation" for purposes of disclosure or whether one issue is really a corollary of the other; (2) the issue is left open regarding the requirements of an in-camera hearing to determine whether or not disclosure may be required and finally (3) whether such an in-camera hearing would be adversary in nature.

The Eighth Circuit contrary to the Third, Fourth and Fifth Circuits does not approach the issue of disclosure from the perspective of participation of the informant. The test articulated by the Eighth Circuit in its opinion *United States* v. *Hurse*, 453 F.2d 128, 131 (1972) is that where probable cause rests on the validity of the informant's information it is essential both to a fair trial and

to the integrity of the verdict that the Court satisfy itself that police officers did have probable cause for the initial entry into defendant's premises and for his arrest. In that case, the informant was not found to be a participant insofar as the informant was not present at the time of the arrest or the search and seizure of the defendant's premises. However, the officer's basis for demanding entrance to and searching the defendant's home rested on a statement provided by the informer that he had purchased narcotics from defendant at defendant's home and that defendant had a shotgun. When the role of the informant in the *Hurse* case is compared to the role played by the informant in a Fifth Circuit case, it is clear that the Eighth Circuit considers such information to require disclosure of identity, however, the same facts supporting disclosure in the Eighth Circuit would relegate an informant to the status of a mere "tipster" in the Fifth Circuit. Notably, the Eighth Circuit also supports the requirement of an in-camera hearing to determine the credibility and accuracy of the informant. However, unlike the Fifth Circuit, the Eighth Circuit is unequivocal in its requirement that the hearing be held whereas the Fifth Circuit leaves open the question when such a hearing is required. See also, *Cochran* v. *United States*, 291 F.2d 633 (8th Cir. 1961).

The Ninth Circuit has taken several different approaches to the requirement of disclosure of the identity of the informant for purposes of testing his credibility and accuracy in supplying information which sup-

ports probable cause. In the case *Costello* v. *United States*, 298 F.2d 99 (1966) on a Motion to Suppress in a narcotics prosecution, the trial court's refusal to require the government to disclose the name of an informant on whose *tip* probable cause for defendant's arrest was based, was reversible error. This is clearly a different approach to disclosure than taken by any of the prior circuits named herein. The Court stated:

> The alleged 'tip', upon which virtually sole reliance is placed, would if reliable, have warranted a man of prudence and caution in believing that a narcotic offense had been committed, but the reliability of the informer is the controlling factor. All the cases in which a tip has been heavily relied upon to establish probable cause have stressed the need for 'a substantial basis for crediting the hearsay'. . . (at 101)

In spite of the language of the *Costello* opinion, the Ninth Circuit held in *United States* v. *King*, 478 F.2d 494 (1973) that the rule in the Ninth Circuit is that the informant need not be disclosed when the sole issue is probable cause citing *United States* v. *Mehicz*, 437 F.2d 145 (1971), cert. den. 402 U.S. 974 and *Lannom* v. *United States*, 381 F.2d 858 (1967). The Court states:

> Their argument is that the informant gave false information, not that the officer did not have reason to believe that what he was told

> was true. Such an attack is not permitted in a hearing to determine probable cause and the informant's identity would, therefore, not have been relevant. (at 508).

To further confuse the development of case law in the Ninth Circuit, the Court of Appeals held in *United States* v. *Anderson*, 509 F.2d 724 (1975), cert. den. 420 U.S. 910, that rather than establishing a fixed rule that either requires or precludes disclosure of the informant's identity when probable cause is an issue the Court held that the responsibility for striking the balance rests within the discretion of the trial judge. In striking that balance, the trial judge, *in the exercise of his discretion,* can conduct an in-camera hearing to which the defense counsel but not the defendant, is admitted. Thus, not only is the development of case law in this area confused but the Ninth Circuit's approach to an in-camera hearing is considerably different than that from other circuits. The Ninth Circuit seems to indicate that the in-camera hearing should be adversary in nature, however, only the defendant's counsel is permitted to be present.

The conflict which exists among the aforementioned Circuits regarding the disclosure of the informant's identity at the probable cause hearing, where the issue of his credibility and accuracy in involved, is manifest. Not only does the conflict exist among the Circuits, it exists within the Circuits themselves. The development of case law in this area is sporatic and formulated

without any standards to insure uniformity in practice. Thus, it is encumbent upon this Honorable Court to consider the issue presented herein and make a determination as to when disclosure of the informant's identity is required at the probable cause stage, where the issue of the accuracy and credibility of the informant is raised, so that a defendant's Fourth, Fifth, Sixth and Fourteenth Amendment rights guaranteed him by the Constitution of the United States are not disregarded.

III.

Where the State introduces evidence of the informant's substantial participation and actual presence at the occurrence of the commission of criminal acts which serve as the basis of a continuing criminal enterprise for which Petitioner has been charged, does the failure to reveal the identity of the informant where his testimony was essential to the presentation of the Petitioner's defense, violate the requirements of *Roviaro* v. *United States, supra,* and *McCray* v. *Illinois, supra*?

This Court should grant certiorari because an important question affecting the personal rights of the citizens of the United States traditionally recognized within the protection of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States is in issue. The Petitioner herein raised in his Motion for Disclosure of Informant's Identity the fact that disclosure was essential to the preparation of his defense, to-wit: entrapment. Petitioner reurged his Motion at numerous times during the conduct of the

trial and again raised the same issue in his brief which was submitted to the Texas Court of Criminal Appeals. Not only was the presence of the informant at Petitioner's trial necessary to develop his defense of entrapment, but as the facts presented herein indicate, the crucial question as to whether or not the informant was present at the December 18 prostitution party was controverted by the statements made by Sergeant Fowler and Officer Duncan, through their own testimony given at the pretrial hearings and that testimony which was presented at trial and the informant was the only witness who could provide a truthful account of his whereabouts on that date. The record clearly demonstrates that at the pretrial hearings evidence was presented, through the testimony of Officer Duncan, that the informant was not in fact present at the December 18 prostitution party. However, at trial, Sergeant Fowler testified on direct examination that the informant was present at the aforementioned party. Therefore, the inability on the part of the Petitioner to present his defense of entrapment, to require the informant's presence at trial to determine whether or not the informant was present at the very transaction which was said to be one occurrence constituting the crime for which the Petitioner was charged, and the Petitioner's inability to test the truth and veracity of the officers through the use of the informant denied Petitioner's Sixth Amendment rights to confrontation, compulsory process and effective assistance of counsel.

The landmark case, *Roviaro* v. *United States, supra,* carefully set forth the following standard:

> Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest and protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case taking into consideration the crime charged, *the possible defenses, the possible significance of the informer's testimony,* and other relevant factors. (at 60-62) (emphasis added)

It is clear that from the facts presented herein regarding the plethora of contradictions in the evidence presented by the State and the fact that Petitioner requested the informant's identity to assist in the preparation of his defense of entrapment, that the State trial court failed to take into consideration those elements which the Supreme Court has articulated to be essential to the determination of whether disclosure is required.

The Petitioner herein also pointed out a very crucial fact in his Motion for Disclosure of the Informant's Identity which was not considered by the Appellate Court in its opinion. The Petitioner herein was charged with engaging in a prostitution enterprise as prohibited by Section 43.04 of the Texas Penal Code. See Appendix I, Exhibit C for Section 43.04 and the Practice Commentary where the statute defines the offense as a continuing enterprise. The State opposed disclosure of the informant's identity in that the State claimed that the informant was not present at the December 18 prostitution party and therefore, not present at the criminal occurrence which gave rise to the offense. However, it was established by the evidence presented that the informant was present on December 9 when phone calls were made to Petitioner's co-defendant from Francis Weatherspoon's residence; the informant personally set up a date with a prostitute, met with the prostitute at the Ramada Inn Hotel and was accommodated by the prostitute; the informant was present in the Petitioner's home wherein he claimed that he saw the prostitution books and records and recording equipment and further, the informant was present on the date that Officer Duncan and Sergeant Fowler met to place a telephone call to Petitioner's co-defendant on December 18, 1974. Petitioner argued in his Motion that the prostitution enterprise was a continuing offense and that the fact that the informant was present during the entire course of conduct made his presence at trial indispensable. Additionally, at Petitioner's trial, evidence of the entire course of conduct was

admitted to prove the guilt of the Petitioner and in fact the prostitution enterprise was presented to the jury as a continuing course of conduct. In fact, the Texas Court of Criminal Appeals in considering Petitioner's objection to the admission of testimony regarding other women who were allegedly recruited for prostitution, the Court of Appeals responded by stating:

> Russel's testimony as to having been recruited for prostitution by appellant and operated from his lake house as well as the fact that she knew it was appellant's house because he had told her so *was admissible as evidence of appellant's continuing course of conduct in using the lake house as well as engaging in a prostitution enterprise . . .*

It is thus clear that the evidence which was presented by the State to prove the Petitioner's guilt indicated that Petitioner had participated in a continuing course of conduct which was evidence of the prostitution enterprise — all of which the informant had knowledge and could testify regarding the actual facts of each occurrence. In fact, in light of the misrepresentations made by the officers at the pretrial hearings and at trial, it is clear that the informant was the only person who could testify as to what really occurred on the dates in question. Thus, Petitioner was denied his right to compulsory process, confrontation and effective assistance of counsel as guaranteed him by the Constitution of the United States in the Sixth and Fourteenth

Amendments and was further denied due process of law and a fair trial which is guaranteed to every defendant who stands accused by the Fifth and Fourteenth Amendments to the United States Constitution.

Moreover, the opinion of the Texas Court of Criminal Appeals in the instant case is in conflict with the opinions of the various Circuit Courts of Appeals. A further conflict exists between the Circuits as well. In the Ninth Circuit, the Court in the case *United States* v. *Miramon*, 443 F.2d 361 (1971), a case similar to the instant case, held contrary to the Texas Court of Criminal Appeals. In that case, the trial court declined to require the government to disclose the name of an informer where the defendant had requested the disclosure to aid in the presentation of his affirmative defense of entrapment. The Court stated:

> Had he (the informant) been known and testified, he might have corroborated Miramon's story (the defendant), at least in part. Under these circumstances there was error. (at 362)

The Court of Appeals in the Ninth Circuit in the case *Velarde-Villarreal* v. *United States*, 354 F.2d 9 (1965), pointed out the absolute necessity of requiring disclosure where the defendant presents the affirmative defense of entrapment. The Court stated:

> The government must know that an eager informer is exposed to temptations to produce

> as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well. One could hardly expect such informants always to stay on the proper side of the line which separates those two cases. And since the government chooses to utilize such agents, *with the attendant risk of entrapment, it is fair to require the government which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished.* (emphasis added) (at 13)

The Fifth Circuit however takes a position which is contrary to the Ninth Circuit and is abnormally restrictive in view of the flexible rules set forth in *Roviaro, supra.* In the case *Jimenez* v. *United States,* 397 F.2d 271 (1968), the Fifth Circuit held that:

> . . . the government is privileged to withhold the name of the informant on the substantial grounds of public policy unless a defendant *would be prevented from making his defense without knowledge of the informant's identity. Firo* v. *United States,* 5th Cir. 1965, 340 F.2d 597. (emphasis added) (at 272)

While Petitioner herein does claim that he was prevented from making his defense because of the denial of disclosure of the informant's identity, it is still clear that such a restrictive test is nowhere included in the stand-

ards set forth by the Supreme Court in *Roviaro, supra. Roviaro, supra,* stands for the proposition that a balancing of the defendant's interests in disclosure and the interests of public policy should occur and not that a defendant is required to demonstrate that he is completely prevented from making his defense before the courts will allow disclosure, particularly in the guilt or innocence phase of the defendant's trial.

The Sixth Circuit in the case *United States* v. *Barnett,* 418 F.2d 309 (1969), contradicts the test set forth by the Fifth Circuit. In *Barnett, supra,* the Court held that where the defendant was able to maintain that the undisclosed informant was a material witness, that is, the informant was present and participated in the transaction, the requirements of fundamental fairness indicate that the informer's identity would be relevant and helpful to the defense of the accused or essential to a fair determination of the case. The test in the Sixth Circuit appears to be the materiality of the witness and not whether the defendant is completely precluded from presenting his defense. See also *Phillips* v. *Cardwell,* 482 F.2d 1348 (CA 6, 1973).

While the Supreme Court has stated in *Roviaro* that there can be no "fixed rule" as to when disclosure of the informant's identity is required, it is clear that the various Circuits have in fact articulated fixed rules which do not comport with *Roviaro's* requirements but represent a restrictive view of *Roviaro.* In the Second Circuit in the case *United States* v. *Soles,* 482 F.2d 105 (1973), the Court denied disclosure of an informant

who the defendant claimed was essential to the presentation of his defense. The defense was essentially one of mistaken identity. In quoting *Roviaro*, the Second Circuit concluded that the terminology used therein, that is, "is relevant and helpful to the defense of an accused", are words which should not be read with "extreme literalness". (at 109). It is clear from the Second Circuit's statement that the standards set forth in *Roviaro, supra*, are being slowly eroded.

While the Third Circuit in the case *United States* v. *Konigsberg*, 336 F.2d 844 (1964), *cert. den.* December 7, 1964, 85 S.Ct. 327, recognizes that at the guilt or innocence phase of a defendant's trial, disclosure of the informant's identity is required where helpful to the defense and essential to a fair determination of cause, the Court failed to set forth any delineated standards which indicate the type of showing a defendant must make to convince the court that disclosure is required. In fact, the cases referred to in the aforementioned Circuits cite the verbage contained in the *Roviaro* opinion and then merely conclude that a particular case does not factually comport with the *Roviaro* standards without articulating that standard of conduct which would fit the defendant's request for disclosure within the ambit of the *Roviaro* standards, particularly where a defendant has made the claim that disclosure of identity of the informer was essential to the presentation of his defense.

IV.

Where the Petitioner has demonstrated that the informant is the sole witness available to corroborate the Petitioner's claim of entrapment and essential to the entire presentation of his defense at trial, does the denial of disclosure by the trial court based on public policy grounds comport with the constitutional requirements of confrontation, cross-examination and compulsory process assured to Petitioner by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Certiorari should be granted herein due to the fact that the Texas Court of Criminal Appeals has improperly construed the dictates of the Supreme Court in *United States* v. *Roviaro, supra,* resulting in the denial of Petitioner's rights to confrontation, cross-examination, compulsory process and effective assistance of counsel — all of which are guaranteed him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

While the discussion contained in Point III., *infra,* is dispositive in part of the objection raised by the Petitioner in this his fourth question, it is clear that the procedures adopted by the Texas courts do not comport with the requirements of *Roviaro* for an additional reason, to-wit: that the Texas courts have eliminated the concept of public policy as a balancing factor and have transformed the balancing factor of public policy

into a hard and fast rule of immunity preventing disclosure. The Texas Court of Criminal Appeals in citing *Roviaro* v. *United States, supra,* states that:

> '. . . the purpose of the privilege (informant's privilege) is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' The identity of an informant need not be disclosed unless (1) the informant participated in the offense; (2) was present at the time of the offense or arrest; (3) was otherwise shown to be a material witness to the transaction or as to whether appellant knowingly committed the act charged. Carmouche v. State, 542 S.W.2d 701 and cases cited therein.

An examination of the *Carmouche* case again indicates the Court of Appeals' reliance on public policy as a rule of immunity from disclosure. There again, the Court of Appeals cites *Roviaro* for the proposition that the purpose of the informant's privilege is to further and protect the public interest in effective law enforcement and the problem of disclosure of an informant's identity is one that calls for the balancing of public interest and protecting the flow of information against the individual's right to prepare his defense. Nowhere

however does the Court of Criminal Appeals demonstrate that in fact they considered a balancing test in refusing to disclose the identity of the informant. In *Carmouche, supra,* as in the instant case, the Court concludes that the informant was not present at the time of Petitioner's arrest, nor was the informant a participant in the offense. Nowhere does the Court examine other elements which might militate in favor of the Petitioner in light of his claim that disclosure was required to prepare his defense.

In the case *James* v. *State,* 493 S.W. 2d 201 (Tex.Crim.App. 1973), the Texas Court of Criminal Appeals further erodes the standards articulated in *Roviaro, supra,* by stating that an informant must be able to testify directly about the very transaction constituting the crime in order to permit disclosure. Nowhere in *Roviaro, supra,* did the Supreme Court require such a stringent showing on the part of a defendant. In fact, the informer's identity according to *Roviaro* must be disclosed whenever the informant's testimony may be relevant and helpful to the accused's defense. The restrictive interpretation given by the Texas Court of Appeals to the *Roviaro* standards and the Court's concomitant reliance on public policy as a rule of immunity to prevent disclosure is also reflected in the following cases: *Durham* v. *State,* 466 S.W. 2d 758 (Tex.Crim.App. 1971); *Ware* v. *State,* 467 S.W. 2d 256 (Tex.Crim.App. 1971); *Leal* v. *State,* 442 S.W. 2d 736 (Tex.Crim.App. 1969); and *Albitez* v. *State,* 461 S.W. 2d 609 (Tex.Crim.App. 1961).

Unlike the petitioner in *McCray* v. *Illinois, supra,* the Petitioner does not claim that his Sixth Amendment right to confrontation and cross-examination was violated by the State's failure to produce the informant to testify against the Petitioner or by the refusal to allow Petitioner to cross-examine the arresting officers on this particular issue. The Petitioner's denial of his Sixth Amendment privilege of confrontation, cross-examination, compulsory process and right to effective assistance of counsel stems from his inability to confront the informant regarding the misrepresentations made by the police officers of which the informant would have knowledge and his inability to utilize the informant in the presentation of his affirmative defense of entrapment where the informant would be the sole witness who could corroborate his story. It is incumbent upon this Court to further articulate the meaning of the standards articulated in *Roviaro, supra,* to avoid the erosion of those principles and further, to avoid the procedure wherein the trial court fails to balance the defendant's need for a material witness with the dictates of public policy, and instead creates a hard and fast rule of immunity where the constitutional rights of a defendant are vitiated.

CONCLUSION

It is respectfully submitted that this Honorable Court grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the Court of Criminal Appeals of Texas for action consistent with the opinions of this Court so that there will not be a curtailment of Petitioner's constitutional guarantees

under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Recently, Mr. Justice White in his dissent in *Brown Transport Corp.* v. *Atcon, Inc.*, No. 77-1581 (on Petition for Writ of Certiorari to the Court of Appeals of Georgia), denied December 4, 1978, pointed out:

> Our Rule 19 provides that one of the principal factors in determining whether certiorari should be granted is whether the decision below conflicts with another decision: is the federal law, statutory or constitutional, being interpreted and enforced differently in different sections of the country? This has been an important criterion for the exercise of the court's power since most of the court's jurisdiction was made discretionary in 1925.
>
> When one examines the Petitions for certiorari on the September 25 conference list that have so far been denied, it is not difficult to find a good many cases in which the court refused to review lower court decisions that conflicted with decisions of other federal or state appellate courts. The following are examples of such cases.

It is the belief of the Petitioner herein that pursuant to Rule 19 he has demonstrated a manifest conflict between the interpretations of the Texas Court of Criminal Appeals and other federal and state courts in this country. The Petitioner requests that this

Honorable Court grant certiorari because of the immense importance of the questions raised by Petitioner herein and the constitutional significance to all other defendants who are similarly situated in either a federal or state proceeding.

Respectfully Submitted,

WOODY AND ROSEN

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CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of January, 1979, three conformed copies of the foregoing Petition for Writ of Certiorari were served upon the Honorable John Hill, Attorney General of Texas, and the Honorable Henry Wade, District Attorney of Dallas County, by placing copies of same in the United States Mail, with postage prepaid and affixed thereto, certified, return receipt requested, and addressed to the said John Hill at the Capitol Building, Austin, Texas and to the said Henry Wade at the Dallas County Court House, Dallas, Texas.

_____

CLYDE W. WOODY

APPENDIX I

EXHIBIT A

PER CURIAM OPINIONS (UNPUBLISHED)

* * * *

*Title**	*Number*	*County*	*Offense*	*Disposition*	*Date*
Etchieson	53167	Dallas	Aggravated Promotion of Prostitution	Affd.	5/ 3/77

* * * *

VIRGIL JOHN ETCHIESON,
Appellant

versus

No. 53,167

The State of Texas,
Appellee

Appeal from Dallas County

Attorney: Emmett Colvin

OPINION ON APPELLANT'S MOTION FOR REHEARING

Virgil John Etchieson appeals from his conviction for

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* The title of each case is the name of the indicated appellant versus the State, unless otherwise indicated.

the offense of aggravated promotion of prostitution, as denounced by V.T.C.A., Penal Code, §43.04. The jury assessed punishment at 10 years' confinement and a $5,000 fine. The judgment was affirmed in a prior per curiam opinion.

The record shows that appellant was engaged in running a "call-girl" type operation from his lakehouse on Lake Dallas. The instant offense is alleged to have occurred on Dec. 18, 1974. He was arrested on Dec. 20, 1974, at the time of the execution of a search warrant by officers at his lake home on that date.

One of the rooms in his home was used as an office. It contained, among other things, telephones, recording equipment, and automatic answering devices. Also found in the room was a "trick list" described by officers as a list of potential or actual customers for prostitutes. The list was also coded to reflect such information as wife answers the phone, nosey secretary, "gear," check good and don't take check. It also contained the names of almost 50 available prostitutes. A customer could obtain the services of one of the prostitutes through the use of an escort service. A customer would call the listed number of the operation and the automatic answering service would tell the caller to leave his name and telephone number and he would be called back. Prior to being called back, the customer's name would be checked against the "trick list" and if all was in order the call would be returned and a date made. A prostitute would then be sent to fulfill the

commitment. Each return call reflected was shown to have been made by Pamela Lou Wood, also known as "Cyn."

The events leading to appellant's arrest and exposure of his operation were brought about by the cooperation of a prostitute named Frances Witherspoon and a police informer named Jimmy Hopgood with officers of the Dallas Police Department's vice squad.

The initial contact with appellant's operation was established on Dec. 8, 1974, by Sgt. D. F. Fowler through Witherspoon, who was also known as "Sabrina." Witherspoon placed a call to Wood on appellant's unlisted telephone number, 231-9061, and told Wood that she had a trick that she was unable to service because of a recent abortion and requested that she take care of him. Wood assured Witherspoon that he would be taken care of because she had vouched for him. The name of Sam Williams was given to Wood, an alias used by Hopgood.

On Dec. 10, 1974, a date was arranged for Hopgood using the name Williams through Wood at the Ramada Inn Convention Center in Dallas, Deborah Walker, known as Sandy, kept the date and accommodated Hopgood.

Shortly thereafter, Fowler had a series of conversations with Wood using Hopgood's alias. It was during these conversations that Fowler arranged a party in-

volving the 7 prostitutes who were arrested on Dec. 18, 1974, at a hotel in Dallas. Fowler had told Wood that there was to be a MasterCharge seminar held at the hotel and it was his desire to give a Christmas party for the 7 men attending. Wood agreed that 7 girls would be furnished and that the girls would provide a lesbian-type show first and then each of the men would have sexual intercourse with one of the prostitutes.

Through the use of fellow police officers and a few cooperating civilians, Fowler was able to assemble 6 men at the designated hotel room. The women began arriving individually at 9 o'clock p.m. Upon arrival they all undressed and began performing their show. Fowler, in order to make his case against the women involved, stopped them and had the women pair off with the men before continuing the show. Each woman was then paid the agreed price of $200 for her services. Fowler, who had a radio taped to his body, then transmitted a prearranged signal to officers waiting in a room across the hall. The officers entered and arrested all 7 of the prostitutes. The names of all 7 prostitutes were found in appellant's files at his office in his lake home.

On the basis of this information as well as other information Sgt. Roger Duncan, also of the vice squad, filed an affidavit which was used to obtain a search warrant from the Hon. Robert L. Sparks of Denton County to be executed on appellant's lake home. Appellant and Wood were both arrested at the time the warrant was executed.

Initially, appellant contends that the trial court erred in failing to require the State to disclose the identity of the informant. At the hearing on appellant's motion to disclose the informant's identity, Sgt. Fowler testified that prior to the arrest of the 7 prostitutes at the hotel on Dec. 18, 1974, he had discussed arrangements for the party with Pamela Wood by calling her at 231-9061 on 3 occasions and again a fourth time on the day of the party. He related that on Dec. 18, 1974, he met with Sgt. Duncan near a pay telephone on Harry Hines Blvd. Someone was with Duncan, but that person did not have anything to do with or play any part in making the arrangements for the 7 prostitutes to come to the hotel to the alleged Christmas party on that evening. Fowler further testified that he had no idea that anyone would be with Duncan when they had arranged to meet that afternoon.

However, it did not matter whether or not Duncan had anyone with him. After he had placed the fourth call to Wood and given her the room numbers at the hotel where the girls were to go, he told Duncan the substance of his telephone conversation in a quiet manner so that it could not be heard by the individual who was with him. Fowler also testified that the person who was with Duncan was not present at the time the 7 prostitutes were arrested at the hotel. To his knowledge that individual was nowhere near the hotel. Fowler emphasized that all of the events leading up to having the girls sent to the hotel on the night of Dec. 18, 1974, were done without any help whatsoever or

any effort on the part of the person who was with Duncan the afternoon of Dec. 18. He also admitted that he knew who the person was, that he feared for the person's life if required to disclose his identity. "The man with Roger Duncan had nothing to do whatsoever with the entire setup of this party in any way."

Likewise, Sgt. Duncan testified that he himself had not been involved in any way with helping Sgt. Fowler arrange the party and that the confidential informant who had given him his information had been working with him in attempting to clear up the prostitution activities of appellant. Their efforts were being made simultaneous with efforts by Fowler. Duncan stated that he had not told his informant anything about Fowler's attempts to set up a party with the prostitutes through appellant or Pam Wood. He acknowledged that his informant had been with him on the afternoon of Dec. 18, 1974, but stated that it had not been prearranged that he and Fowler and the informant meet jointly. He stated that during the course of Fowler's conversation with Wood on the afternoon of Dec. 18 he was close enough to Fowler to overhear Fowler's portion of the conversation but his informant was a few feet away from him on the other side and that when Fowler had completed his conversation he informed only him and not the informant of the full gist of the conversation. Once Fowler's conversation had been completed, Fowler departed and Duncan and his informant left to go their separate ways. Duncan also testified that he was present that night at the hotel and had

actually participated in the arrest of the 7 prostitutes there but that his informant was not present. When questioned about the statement in his affidavit, "On Dec. 18, 1974, the informant and an undercover agent of the Dallas Police Department called 231-9061 and requested seven (7) females for prostitution purposes to be sent to their hotel," Duncan related that what he meant was that the informant was present at the time Fowler made the call but that Fowler had made the call personally and did not know the purpose of the call nor to whom Fowler was talking. Further, the reference to "their hotel" in the affidavit was the ". . . hotel that Sgt. Fowler had prearranged and the other undercover officers working with Sgt. Fowler."

In his brief, appellant quotes from Roviaro v. U.S., 353 U.S. 53, 77 S.Ct. 623, 1 L.ed 2d 639, wherein it was written:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense whether a proper balance renders non-disclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors."

However, the Court also wrote:

> ". . . . The purpose of the privilege (informant's privilege) is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

The identity of an informant need not be disclosed unless (1) the informant participated in the offense; (2) was present at the time of the offense or arrest; (3) was otherwise shown to be a material witness to the transaction or as to whether appellant knowingly committed the act charged. Carmouche v. St., 542 S.W.2d 701, and cases cited therein. In the instant case the informant was not present at the time appellant was arrested nor was the informant a participant in the offense. Appellant contends, however, that the informant could be a material witness as to whether or not Duncan relied on credible information in making his affidavit. He argues that the statement in the affidavit wherein Duncan talks about the telephone call made by Fowler on Dec. 18, 1974, is sufficient to show the informant's participation in the offense. Appellant relies upon James v. St., 493 S.W.2d 201. In James, the informant brought the defendant and the undercover agent together and was present when the sale of the marihuana was consummated. The informant in the instant case was neither present at the time the

prostitutes were arrested nor did he initiate or participate in establishing initial contact or making arrangements with appellant for the prostitutes to be present at the hotel on Dec. 18, 1974. The James case is not applicable. See also Carmouche, supra.

Appellant next contends that the search warrant was invalid. Hearings on the motion to suppress evidence were held on April 4, April 18 and April 25, 1975. We conclude that the trial court properly overruled the motion for reasons which follow.

He argues that the affidavit was insufficient to establish probable cause. Under Aguilar v. Tex., 378 U.S. 108, 84 S.Ct. 1509, 12 L.ed 2d 723, the affidavit must contain (1) the underlying circumstances which led to the informant's conclusion of guilt, and (2) the underlying circumstances which led the affiant to believe that the informant was credible and reliable. The affidavit in the instant case contains more than enough information to satisfy both prongs of the Aguilar test. This affidavit, dated Dec. 20, 1974, reads as follows:

> "MY BELIEF OF THE AFORESAID STATEMENT IS BASED ON THE FOLLOWING FACTS:
>
> "I have been informed of the foregoing set out facts by a person whom I know to be reliable, credible and trustworthy, who states the following facts: I, the affiant, received information from a confidential informant on

numerous occasions, most recently on Dec. 16, 1974, that Virgil John Etchieson is operating a prostitution enterprise from the above mentioned location. The informant stated that he visited the location on Dec. 16, 1974, and observed Virgil John Etchieson discussing the price for a date of prostitution with an unknown date. The informant also stated that books containing names and telephone numbers of male persons were referred to when male persons called Virgil John Etchieson requesting dates of prostitution. Virgil John Etchieson is a known pimp and character and has been convicted for procuring and prostitution offenses in the past. I, the affiant, have received information from this informant in the past on at least five different occasions and on each occasion the information proved to be reliable, true, and correct. On Dec. 17, 1974, I, the affiant, observed the informant call 231-9061, a phone number registered to Virgil John Etchieson at the above mentioned address, and request a date of prostitution. A female answered the call and described herself as 'a red-headed girl called Sin,' and she agreed to send the informant a woman to fill a straight date of prostitution for the sum of $50. The informant stated that the prostitute did in fact meet him and filled a date of prostitution with him for the sum of $50. On Dec. 18, 1974, the

informant and an undercover officer of the Dallas Police Dept. called 231-9061 and requested seven (7) females for prostitution purposes be sent to their hotel. The female known only as 'Sin' again answered the call and stated that she would send seven (7) prostitutes to their location to perform straight dates, french dates, and show dates of prostitution for the sum of $200 for each prostitute. The prostitutes did in fact come to the designated location and did agree to the above described dates of prostitution, were paid by the undercover officer and then arrested for Violation Sec. 43.02 (Prostitution) of the Texas Penal Code. The phone number called on each occasion is registered to Virgil John Etchieson the known pimp. The information on who the telephone is registered to was obtained after Dallas Police Dept. officers obtained a court order to get the information. The informant's information has always been reliable, true, and correct."

Appellant asserts the search warrant was invalid because it was based on intentional misrepresentations by the affiant. Off. Duncan. The alleged misrepresentations center on Duncan's testimony at the hearings on the motions to suppress and to disclose the identity of the informant.

The record shows that Judge Sparks questioned Duncan about the affidavit prior to issuing the search

warrant. Much of Duncan's testimony was the same testimony which has been set out in the discussion of appellant's first ground of error.

The judge had before him evidence from which he could conclude that the informant was not present at the time of the arrests on Dec. 18 and 20, and that he was not a material witness in any respect. While there appear to be some minor discrepancies between Duncan's testimony and the facts set forth in the affidavit, the record before us supplies no basis for a determination that the search warrant was based upon intentional misrepresentations by the affiant. The judge was the sole judge of the credibility of the witnesses and the facts at the pretrial hearings. See Draper v. St., 539 S.W.2d 61. He observed Duncan's demeanor and the manner in which he testified and determined that the affidavit was valid. No error is shown.

Nor do we find merit in appellant's attack on the sufficiency of the description of the premises in the warrant due to the fact that the residence was on a rural route and that there was no box with such a number on it located in front of the place and that the house searched was not red and green brick. The description contained in both the affidavit and the warrant is: "A residence, split-level, *red and green brick*, located at Route 3, Box 435, Lewisville, Denton County, Texas." (emph. supp.) It further states that the premises searched were a residence, split-level, *red brick with green trim*, with the address of Route 3, Box 435, Lewisville, Denton Coun-

ty, Texas, and that the premises were occupied by Virgil John Etchieson who was a white male.

Such minor discrepancies, if any, in a search warrant otherwise sufficiently describing the general location of the premises and specifically describing the premises themselves will not vitiate a search warrant for insufficient description. All that is required is that there be sufficient definiteness to enable the officer to locate the property and distinguish it from other places in the community. Smith v. St., 478 S.W.2d 517.

The contention that the seizure of his records from his office in his home violated his 4th and 5th Amendment rights is without merit. In Andresen v. Md., 427 U.S. 463, 96 S.Ct. 2737, 49 L.ed 2d 627, the Supreme Court of the United States held that the search of an individual's office for business records, their seizure, and subsequent introduction into evidence, did not offend the 5th Amendment nor did such a search warrant as in the instant case offend the accused's 4th Amendment rights.

We have reviewed the record in its entirety and find that the remaining attacks made by appellant on the sufficiency of the affidavit and search warrant are without merit.

Next, he contends that venue was improper in Dallas County and that the trial court was without jurisdiction to try the offense. At the conclusion of the

evidence, he moved for an instructed verdict but did not mention venue. His motion, in substance, is as follows:

> "The evidence is wholly insufficient to establish jurisdiction of the offense or the persons of the defendants."

There is a distinct difference between jurisdiction and venue. Jurisdiction concerns the authority or power of a court to try a case. Practically all, if not all, district courts have the authority to try felony cases. Venue has to do with the place or county where a case may be tried.

The same contention was raised in Bass v. St., 464 S.W.2d 668, where we held that such an objection did not put the trial court on notice that venue had not been proven.

Lastly, he contends that the trial court improperly admitted into evidence the extraneous offense involving the procurement of Brenda Russell for prostitution purposes. V.T.C.A., Penal Code, §43.04, under which he was convicted, provides:

> "(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.
>
> "(b) An offense under this section is a felony of the third degree."

Russell's testimony as to having been recruited for prostitution by appellant and operated from his lakehouse as well as the fact that she knew that it was appellant's house because he had told her so was admissible as evidence of appellant's continuing course of conduct in using the lakehouse as well as engaging in a prostitution enterprise as prohibited by §43.04, supra. It is of no consequence that Russell's part in appellant's operation occurred some 2 or 3 months following the instant offense for which appellant has been convicted. Here, as in Shappley v. St., 520 S.W.2d 766, proof of the extraneous offense by appellant was admissible to show his intent and knowledge as well as the purpose of the enterprise which he conducted from his lakehouse. While it is true that an accused is entitled to be tried on the accusation made in the State's pleading and not for some collateral crimes or being a criminal generally, it is equally consistent and recognized by this Court that this is the general rule; however, several exceptions have been established. The most important ones relating to this case are those of scienter and common plan, scheme or design. Shappley, supra. Albrecht v. St., 486 S.W.2d 97. We hold that the testimony of Russell was admissible in the instant case as evidence of appellant's intent and motive to commit the offense of aggravated promotion of prostitution as this was a circumstantial evidence case and extraneous offenses are admissible to show motive, intent and design as part of the State's direct evidence. See Albrecht, supra.

No reversible error having been sworn, the motion for rehearing is overruled.

Douglas, Judge

En Banc
Vollers, J., not participating.

DISSENTING OPINION

Appellant's principal contentions are that the court should have granted his motion to suppress and his motion to require the State to disclose the identity of its informant. A proper consideration of these contentions requires that we examine the pertinent events in the order in which they occurred.

I.

The affidavit supporting the search warrant was sworn to on Dec. 20, 1974, by Officer Roger Duncan. It is set out in full in the majority opinion, and therefore only a small part of it will be repeated here:

> "On Dec. 18, 1974, *the informant and* an undercover officer of the Dallas Police Dept. called 231-9061 and requested seven (7) females for prostitution purposes be sent to *their* hotel. The female known only as 'Sin' again answered the call and stated that she would send seven (7) prostitutes to *their* loca-

tion to perform straight dates, french dates, and show dates of prostitution." (emph. added)

Prior to trial appellant filed his motion to suppress, and the trial court held several hearings on the motion. The first of these was on April 4, 1975. At that time Off. Duncan testified that he prepared the affidavit, typed it himself, signed it, and swore to it on his oath before the magistrate. He stated that Sgt. B. F. Fowler was the undercover officer who was referred to but not named in the affidavit.

On cross-examination Duncan was asked "which of the allegations in this affidavit are based upon Sgt. Fowler's information that he had given you?" The following exchange then took place:

"A. Yes, I can. Towards the bottom of the affidavit where it states on December the 18th — about middleways through the affidavit — 'On December the 18th, 1974, the informant and the undercover officer of the Dallas Police Dept. —,' — that's with reference to Sgt. Fowler.

"Q. All right. So then the sentence following that, describing the activities on December the 18th, are connected with Sgt. Fowler?

"A. That's correct.

"Q. All right. Are any of the other allegations contained there on the face of the

affidavit pertaining to information related to you by Sgt. Fowler?

"A. No, they're not."

At no time during this hearing did Duncan suggest that the statements in the affidavit which concerned Sgt. Fowler were untrue or distorted in any way. In fact, in testifying about the affidavit and the search warrant,[1] Duncan indicated that he remembered all of the information in both "quite clearly." In doing so, he thereby implied that he had nothing to say which would constitute a qualification or repudiation of the statements in the affidavit. The following exchange took place while Duncan was in the process of verifying the authenticity of the photocopies of the affidavit and search warrant

"Q. Now St's Exhs. 1 & 2 are Xerox copies, is that correct?

"A. Yes, they are.

"Q. Are they, as far as you know and to the best of your knowledge, true and exact Xerox copies of the originals?

"A. Yes, they are.

"Q. How do you know that?

"A. My signature is affixed to the affidavit and *I recall the information quite clearly on both copies.*" (emph. added)

On April 18, 1975, the trial court held a second hearing on appellant's motion to suppress. The primary

1 St.'s Exhs. 1 & 2.

purpose of this hearing was to determine whether the search warrant was sufficiently specific in its description of the address and location of the premises to be searched. Duncan testified, and again the record reflects no retreat from the language in the affidavit.

The next hearing was held on July 8, 1975. At the beginning of the hearing the trial judge indicated that he had granted all of appellant's motions "with the exception of the Motion to Quash and I have not ruled on the Motion to Reveal the Informant."[2] The record makes it clear that the motion to reveal the informant's identity was presented to the trial court on the day of this hearing[3] and that the State received its copy of this motion on or before the day of this hearing but after the day of the last previous hearing.

Not coincidentally, it was at this hearing that Duncan — as well as the undercover agent Fowler — first testified that the statements in the affidavit were in es-

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2 This latter motion bears no filemark, although the unsigned order attached to it is dated July 8, 1975. The memorandum in support of this motion is filemarked with the date July 8, 1975, as are the motion to quash the indictment, the "motion with reference to arraignment of the accused," the motion to require endorsement of grand jury witnesses, the motion to direct the court reporter to record certain portions of the trial, the motion for inspection of grand jury testimony, the motion for disclosure of electronic surveillance evidence, and the motion requesting that the jury assess punishment. From this and the judge's statement quoted in the text, it seems inescapable that the motion to disclose the identity of the informant first came to the court's and the State's attention on July 8, 1975, at the very latest.

3 See fn. 2, supra.

sence incorrect. Fowler testified that on Dec. 18, 1974, he met Duncan and Duncan's informant. Subsequently, in the presence of Duncan and the informant, Fowler used a pay telephone attached to the wall of a building and called appellant's residence. The purpose of the call was to inform Pamela Wood (also called "Sin" and "Cyn") of the location for the proposed dates of prostitution.

Fowler testified that Duncan and the informant were standing "3 or 4 feet" away from him when he made the call. He denied that the informant listened in on or participated in the phone call, and he stated that he did not believe that the informant heard what Fowler was saying to Wood. After completing the call, Fowler quietly told Duncan that Wood had assured him that the 7 prostitutes would be at the designated hotel room by 9 o'clock. On redirect examination Fowler stated that the informant had played no role in the earlier negotiations which led to the purported date with the 7 prostitutes.

Duncan followed Fowler to the stand and testified that he met Fowler during the afternoon of Dec. 18, 1974. He stated that the informant was with him, but the informant was not at the location in order to help Fowler "in any way." Duncan acknowledged that the informant was present when Fowler called Pamela Wood and that he (Duncan) was able to overhear Fowler's portion of the call to Wood. However, according to Duncan, the informant was not as close to Fowler during the call as Duncan was.

Duncan testified that after Fowler's call was completed he spoke with Duncan but not with the informant. Duncan stated that Fowler did not tell the informant anything about the phone call or anything about the date with the 7 prostitutes.

When asked to explain the above-quoted language of his affidavit — which unequivocally indicated that Fowler and the informant were acting together in making the call to Wood — Duncan stated simply that Fowler made the call personally and that in speaking of "their hotel" he did not mean to refer to the informant in any way. On cross-examination Duncan testified that what he meant to say in the affidavit was that the informant was merely "at the location along with the undercover officer when the call was made." He also stated that by using the word "their" in the phrase "their hotel," he meant to refer to the group of undercover officers who were to be at the hotel for the date with the 7 prostitutes.

II.

Appellant's initial complaint about the nondisclosure of the informant's identity is related to his contention that his motion to suppress should have been granted. Specifically, he alleges that he needed to know who the informant was in order to show that the statements in the affidavit were false.

A.

In Roviaro v. U.S., 353 U.S. 53, the Supreme Court held that where the undercover informant plays a material part in the criminal occurrence which results in charges being filed against the accused, his identity must be revealed. Accord: James v. St., 493 S.W.2d 201. However, in McCray v. Ill., 386 U.S. 300, 309, the Court held that Roviaro applied "where the issue was the fundamental one of innocence or guilt," and that even in such cases the Court "was unwilling to impose any absolute rule requiring disclosure of an informer's identity." 386 U.S., at 311. Instead, the Court stated, what was necessary was a case-by-case" 'balancing [of] the public interest in protecting the flow of information against the individual's right to prepare his defense.' " 386 U.S., at 310, quoting from Roviaro, supra, 353 U.S., at 62.[4]

The ultimate holding in McCray was that it was not necessary to reveal the informant's identity where his only function in the case against the defendant was to provide information which led to a valid search of the defendant's person. However, it should be remembered that there was no allegation or preliminary showing in McCray that the search was based on a false statement; in fact, the trial judge there was "convinced,

4 However, it should be noted that the McCray Court also quoted with approval from Roviaro that where " 'the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [informer's] privilege must give way.' " McCray, quoting from Roviaro, at 60-61.

by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant." 386 U.S., at 305. Nonetheless, in its holding the McCray Court made it clear that disclosure of an informant's identity is much more likely to be necessary where the issue is guilt or innocence than where it is the preliminary question of probable cause. See McCray, supra, 386 U.S., at 309, 311-313.

The holding in McCray applies to the case before us. However, I believe McCray must be read in the light of the Supreme Court's recent decision in Franks v. Delaware, 98 S.Ct. 2646.

B.

In Franks, the Supreme Court of Delaware had held that a defendant could in no instance challenge the truthfulness of the statements in a search warrant affidavit after the warrant had issued. The U. S. Supreme Court reversed, holding that:

> ". . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the 4th Amendment requires that a hearing be held at the defendant's request. In the event that at that

> hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." 98 S.Ct., at 2676-2677.

The present case goes beyond Franks. Here, as in Franks, appellant made a substantial preliminary showing that the affiant, acting with reckless disregard for the truth, included false statements in the affidavit. Moreover, a reading of the affidavit makes it evident that the allegedly false statement was necessary to the finding of probable cause. Compare the affidavit in Franks, reproduced as Appendix A of that opinion. 98 S.Ct., at 2685-2687.

The opinion in Franks makes it clear that allegations of deliberate or reckless falsehood in an affidavit must be specific and must be accompanied by an offer of proof.

> "Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." Id., 98 S.Ct., at 2685.

The problem in the case before us is that, because the informant's identity was not disclosed, appellant was not able to offer proof of what the informant's testimony would have been. In a case such as this — where there is a timely preliminary showing that the affidavit contains a recklessly false statement which is necessary to the finding of probable cause — I would hold that the trial judge must not only hold a Franks hearing, he must also require the State to reveal the name of the informant in those cases where (1) the informant played a material part in the determination of probable cause, and (2) the defense expresses a desire to present his testimony at the preliminary hearing. To hold otherwise is to take over the fact-finding function of the trial judge by assuming that he would give no credence to any of the informant's testimony which happened to disagree with that which supported his finding of probable cause.

This appellant did make the required preliminary showing of a reckless and material falsehood; he also sought to present the testimony of the unknown informant. I would hold, under these facts, that the trial judge's failure to require disclosure of the informant's identity constitutes reversible error. I would also hold that, until the informant's identity is disclosed and the appellant is given an opportunity to present his testimony, we are without power to review on appeal the issue or probable cause.

III.

Appellant's complaint about the nondisclosure of the informant's identity is directed not only to the issue of probable cause. Although appellant initially contends that he needed to know the informant's name in order to show that Duncan's affidavit was not based on probable cause, he also urges that knowledge of identity was also crucial to the issue of entrapment, which is directly related to the issue of appellant's innocence or guilt. Appellant raised this contention in a timely manner in the trial court as part of his motion to require the State to disclose the identity of the informant.

I would hold that Roger Duncan's sworn statements contained in his search warrant affidavit (set out in majority opinion) were sufficient to show that the unidentified informant "helped set up the criminal occurrence and played a prominent part in it." James, supra, at 202. It is not significant that appellant did not raise an entrapment defense at trial. See James, supra, at 203, 206 (dissenting opinions).[5]

For the reasons stated, I would reverse and remand.

Roberts, Judge

Phillips, J., joins in this dissent.

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5 Although I dissented in James, I am of course bound by the holding in that case. (Delivered November 1, 1978)

EXHIBIT B

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

(c) Issuance and contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made

promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence

may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers, and any other tangible objects.

VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS (1977)

Article 1.06. Searches and Seizures.

The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them

as near as may be, nor without probable cause supported by oath or affirmation.

Article 18.01. Search Warrant.

(a) A "search warrant" is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate.

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

(c) A search warrant may not be issued pursuant to Subdivision (10) of Article 18.02 of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

(d) Only the specifically described property or items set forth in a search warrant issued under Subdivision (10) of Article 18.02 of this code or property or items enumerated in Subdivisions (1) through (9) of Article 18.02 of this code may be seized. Subsequent search warrants may not be issued pursuant to Subdivision (10) of Article 18.02 of this code to search the same person, place, or thing subjected to a prior search under Subdivision (10) of Article 18.02 of this code.

Article 18.03. Search Warrant May Order Arrest.

If the facts presented to the magistrate under Article 18.02 of this chapter also establish the existence of probable cause that a person has committed some offense under the laws of this state, the search warrant may, in addition, order the arrest of such person.

Article 38.23. Evidence not to be Used.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Arti-

cle, then and in such event, the jury shall disregard any such evidence so obtained.

EXHIBIT C

§ 43.04. Aggravated Promotion of Prostitution

(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.

(b) An offense under this section is a felony of the third degree.

PRACTICE COMMENTARY

By Seth S. Searcy III and James R. Patterson
of the Austin Bar

Section 43.04 replaces those articles of the former Penal Code aimed at prohibiting maintenance of prostitution. Penal Code art. 514 (keeping bawdy or disorderly house) was the statute most frequently employed and provided a mandatory punishment of a $200 fine and 20 days in jail *for each day* the defendant kept such a house. One defendant was convicted under that article of 51 counts, and sentenced to 1,020 days in jail and fined $10,200, Green v. State, 320 S.W.2d 818 (Cr.App.1959). Section 43.04 grades the offense a

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of ther nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,

and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligation and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF TEXAS

Article 1, Section 9. Searches and seizures.

Sec. 9. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Article 1, Section 10. Rights of accused in criminal prosecutions.

Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence ad-

mitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impreachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Warrant Or Summons Upon Complaint.

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government of a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It

shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall

be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling, house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

Rule 5. Proceedings Before The Commissioner.

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a

warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the com-

missioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., Section 957.

felony, which authorizes up to 10 years in the penitentiary, and expands its scope to cover operation of a prostitution enterprise whatever its form or location.

This section's requirement of a prostitution enterprise — a continuing operation using at least two prostitutes — changes prior law under which convictions for "keeping a bawdy house" were affirmed even though only one prostitute was kept for just one night, *e.g.*, Spears v. State, 232 S.W. 326 (Cr.App.1921).